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Hon. Mary Jo Heston  
Chapter 11  
Location: 500 W. 12th Street,  
2d Floor, Vancouver, WA  
Hearing Date: 1/9/18  
Hearing Time: 9:00 a.m.  
Response Date: 1/2/18

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

In re

PAUL JOE,

Debtor.

Case No. 17-41216-MJH

CREDITOR CITY OF ST. HELENS'  
MOTION TO CONVERT THE  
DEBTOR'S CHAPTER 11 CASE TO  
A CHAPTER 7 CASE PURSUANT  
TO 11 U.S.C. § 1112(b)

The City of St. Helens ("St. Helens"), a municipality under the laws of the state of Oregon and creditor in the above-entitled case, files this *Motion* to convert the Debtor's Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C § 1112(b). This motion is supported by the court file, the legal arguments below, and the Declaration of Douglas P. Cushing filed concurrently herewith.

**I. Jurisdiction and Venue**

1. This Court has jurisdiction to hear this matter and enter a final order granting the relief requested herein pursuant to 28 U.S.C. §§ 1334 and 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. This matter is a core proceeding under 28 U.S.C. § 157(b)(2) upon which this court has the constitutional authority to enter final order.

1           3.       The statutory predicates for the relief requested herein are 11 U.S.C §§ 105(a),  
2   1109(b), and 1112(b).

3                                   **II. Background Relevant to Requested Relief**

4           4.       Debtor previously instituted a Chapter 11 bankruptcy entitled *In re Paul Joe*,  
5   District of Oregon Bankruptcy Case No. 12-36345-elp11 (“2012 Bankruptcy”). The 2012  
6   Bankruptcy resulted in a plan of reorganization confirmed in July 2013 (the “2013 Plan”).  
7   Following confirmation of the 2013 plan, Debtor consistently fell behind on payments to  
8   St. Helens and other secured creditors. The 2012 bankruptcy was terminated without discharge  
9   in July 2013.

10          5.       On March 30, 2017, the Debtor filed a petition for relief under Chapter 11 of the  
11   Code (the “Petition”). (Docket 1).

12          6.       St. Helens holds a secured claim for improvements under the local improvement  
13   district, and filed its’ proof of claim on July 17, 2017 (Claim 3).

14          7.       Debtor has acknowledged on his Petition that this is a single asset bankruptcy  
15   consisting solely of commercial property situated in the State of Oregon, in City of St. Helens,  
16   Columbia County (the “Property”), currently operating as Bing’s Restaurant. The Debtor claims  
17   the property has a value of \$2.5 million.

18          8.       On July, 25, 2017, the Debtor filed an *Ex Parte Motion to Extend Exclusivity*  
19   *Periods* (“*Motion*”) (Docket 42), requesting an extension of the exclusivity period to file a plan  
20   under 11 U.S.C §1121(b) from July 28, 2017, to October 31, 2017, and an extension of the  
21   exclusivity periods under 11 U.S.C § 1121(c) from September 26, 2017, to December 31, 2017.

22          9.       The Debtor represented in his *Motion*, that he accepted an offer to subdivide and  
23   sell a portion of the Property, was in the process of formalizing the terms of the proposed  
24   transaction, and intended to file a sale motion under Section 363 of the Code to obtain the  
25   Court’s approval of the proposed sale of the Property.



1 factors from which the Court may find a showing of “cause” for purposes of paragraph (b)(1).

2 Cause for conversion exists when a moving party can demonstrate:

3 a. the substantial or continuing loss to or diminution of the Debtor’s estate and  
4 an absence of a reasonable likelihood of rehabilitation (11 U.S.C.

5 § 1112(b)(4)(A)); and/or

6 b. failure to file a disclosure statement, or to file or confirm a plan, within the  
7 time fixed by this title or by order of the court (11 U.S.C. § 1112(b)(4)(J));

8 17. Once cause is established by the moving party, dismissal or conversion is  
9 mandatory, unless it is established that appointment of a trustee or examiner is warranted. *See*  
10 *In re Gilroy*, 2008 WL 4531982, at 4 (B.A.P. 1st Cir. Aug. 4, 2008).

11 a. **Conversion Stops the Diminution of Value**

12 18. The test in determining whether there has been a continuing loss to or diminution  
13 of the estate is whether there is “a negative cash flow by the debtor after entry of the Order for  
14 Relief in the Chapter 11 case, [or] depreciation in value of the debtors’ assets notwithstanding a  
15 possible positive cash flow, either condition sufficing to satisfy the first element set forth in  
16 § 1112(b)(1).” *Faden v. Faden*, Civ. No. 90-2863 (CSF), 1990 WL 191861, at \*3 (D.N.J.  
17 Nov. 5, 1990). For purposes of a liquidating Chapter 11 case, a negative cash flow exists so long  
18 as the estate continues to incur post-petition debt. *See Loop Corp. v. U.S. Trustee*, 379 F.3d 511,  
19 515-516 (8th Cir. 2004); “Under the interpretation of § 1112(b)(1) consistently used in  
20 bankruptcy courts, this negative cash flow situation alone is sufficient to establish ‘continuing  
21 loss to or diminution of the estate.’” *Id.* at 515-516.

22 19. Through the duration of the Debtor’s current bankruptcy, no payments have bene  
23 paid toward St. Helens’ secured claim.

24 20. Debtor indicated he accepted an offer to subdivide and sell a portion of the

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1 Property in July 2017; however, no partition paperwork has been filed with the county, and no  
2 motions requesting approval of such sale were filed with this court.

3 21. Further, Debtor acknowledges in his *Motion* that the partial sale of the property  
4 would not satisfy the creditors, and instead stated that he “believe[d] that he will be able to  
5 obtain additional financing secured by the remainder of the Property not being sold.” Debtor has  
6 not supplied any confirmation to the court that such sale is apt to occur, much less that such  
7 additional financing has been obtained, and further has admitted to the Court that such sale  
8 would not only fail to satisfy his creditors, but would also incur additional debts against the  
9 estate in the form of additional financing.

10 22. Debtor has failed to provide any assurance that there is a reasonable likelihood of  
11 rehabilitation of the estate and further continues to incur losses to the estate.

12 23. Further, Debtor consistently fell behind on payments following confirmation of  
13 the 2013 plan in the prior 2012 bankruptcy. Upon completion of all payments under the 2013  
14 plan, debtor was required to reopen the 2012 bankruptcy, but he did not file a motion for entry of  
15 discharge. Debtor was unable to complete payments to his creditors in his prior 2012  
16 bankruptcy, never sought a discharge, and continues to accrue losses in his failure to make  
17 payments to St. Helens and/or provide reassurances in the present bankruptcy.

18 24. Conversion from a Chapter 11 case to a Chapter 7 case is appropriate where the  
19 debtor is continuing to lose money and intends to liquidate. See *In re ABEPP Acquisition Corp.*,  
20 191 B.R. 367 (Bankr. N.D. Ohio 1996).

21 **b. Failure to file or confirm a plan within the time fixed by this title or by order**  
22 **of the Court**

23 25. 11 U.S.C. § 1121 (b) provides that only the debtor may file a plan within the 120  
24 days after the date of the order for relief. 11 U.S.C. § 1121 (c) further provides that a party in  
25 interest other than the debtor may file a plan only if (1) a trustee has been appointed; (2) the

1 debtor has not filed a plan before 120 days after the date of the order for relief; or (3) the debtor  
2 has not filed a plan that has been accepted before 180 days after the date of the order for relief  
3 under this chapter, but each class of claims or interests that is impaired under the plan.

4 26. Pursuant to 11 U.S.C. § 1121(b) and (c), the 120<sup>th</sup> day after the date of the order  
5 for relief in this case was July 28, 2017, and the 180<sup>th</sup> day after the date of the order for relief in  
6 this case was September 26, 2017.

7 27. The Debtor attempted in his *Motion* to extend such exclusivity deadlines, to  
8 October 31, 2017, and December 31, 2017, respectively, however an Order was never entered  
9 granting such extension.

10 28. As of the date of this pleading, no plan has been filed with the court.

11 29. Even if such Order on the Debtor's *Motion* had been entered, the Debtor failed to  
12 timely file his plan by October 31, 2017.

13 30. As it stands, no plan will be confirmed by December 31, 2017.

14 31. Debtor has failed to file or confirm a plan with the time fixed by this title and/or  
15 by order of the Court, and his bankruptcy should be converted and/or dismissed.

#### 16 **IV. Conclusion**

17 Cause exists for conversion of this Chapter 11 case to one under Chapter 7. The Movant  
18 is unaware of any circumstance that would constitute "unusual circumstances" operating as an  
19 exception to the standard set forth in U.S.C. § 1112(b)(1). Accordingly, it is appropriate and in  
20 the best interest of the creditors and this estate for the Court to either convert this Chapter 11  
21 case to a case under Chapter 7 of the Bankruptcy Code.

22 **WHEREFORE**, the Movant respectfully requests that this Court enter an order either

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1 converting the debtor's case from a Chapter 11 to a Chapter 7 or dismissing the Debtor's  
2 bankruptcy, and such other and further relief as this Court deems appropriate.

3  
4 DATED this 12th day of December, 2017.

5 JORDAN RAMIS PC  
6 Attorneys for Creditor City of St. Helens

7 By: s/ Douglas P. Cushing  
8 Douglas P. Cushing, WSBA # 23392

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DATED: December 12, 2017.